Supreme Court, U.S.
FILED
FEB 13 1992
OFFICE OF THE CLERK

No. 91-962

IN THE

Supreme Court Of The United States

OCTOBER TERM, 1991

CYNTHIA HARRIS,

Appellant,

v.

THE CITY OF BIRMINGHAM, ET AL.,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ALABAMA

SUGGESTION OF MOOTNESS

James K. Baker
Counsel of Record
Attorney for the City of Birmingham
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SUGGESTION OF MOOTNESS

Appellee, the City of Birmingham (the "City"), hereby respectfully suggests to this Honorable Court that this case is moot and moves the Court to dismiss the nominal Appellant's appeal on that basis.

The City, in connection with its decision to set another referendum under the legislation made the basis of this Voting Rights litigation, has submitted that legislation to the Attorney General of the United States for preclearance. Consequently, there is no longer a live controversy and the appeal should be dismissed as moot.

This appeal is from the decision of a three judge court pursuant to § 5 of the Voting Rights Act of 1965, 42 U.S.C. 1973(c). The sole issue to be decided by such a court is whether the challenged action — legislation or otherwise — is required to be precleared. The three judge court is not to determine whether legislation, or other challenged action, is in fact discriminatory in intent or effect, but only whether it must be submitted to the Attorney General for such a determination. *E.g., Perkins v. Matthews,* 400 U.S. 379, 384 (1971); *Doughterty Cty., Ga. Bd. of Ed. v. White,* 439 U.S. 32, 42 (1978); *NAACP v. Hampton Cty. Election Com'n,* 470 U.S. 166, 181 (1965).

Likewise, the determinative issue before this Court is whether the three judge court below correctly decided that the legislation here at issue was not required to be submitted for preclearance. Hence, once the subject legislative acts are submitted for preclearance, the § 5 issue before this Court evaporates, and the case is moot.

The City continues to believe and insist that: 1) The commencement and maintenance of this action constitutes the cynical exploitation and abuse of the Voting Rights Act in furtherance of economic interests wholly unrelated to legitimate concerns animated by the Voting Rights Act; and 2) that the Court below correctly determined that the subject legislative acts need not be precleared.

However, the City recognizes and must consider: 1) The substantial expense incident to proceedings in this forum; 2) the virtual certainty that the planned setting of another referendum will result in new, equally unpersuasive, but equally expensive voting rights litigation sponsored by the economic interests driving this case; and 3) that preclearance from the Justice Department will be as efficacious to the City's interests as an affirmance of the decision below — and at substantially less expense.

Given those considerations, by letter dated February 13, 1992, the City submitted the legislative acts at issue — and an anticipated setting for a referendum — to the Justice Department for preclearance. That letter, without its attachments, is reproduced in the appendix hereto, together with an affidavit to provide proof of mailing.

Plainly, the issue before this Court — whether the court below correctly decided that the City need not submit the legislation for preclearance — is now moot. The disputed legislation has now been submitted for preclearance by the Attorney General; whether or not such a submission is required by law is, accordingly, a dead issue. *See, Watkins v. Mabus,* ___ U.S. ___, 112 S.Ct. 412 (1991).

For the reasons stated, this Court is due to dismiss as moot the appeal of the nominal Appellant.

Respectfully submitted,

/s/ James K. Baker

James K. Baker
Counsel of Record
Attorney for the City of Birmingham
800 AmSouth-Sonat Tower
Birmingham, Alabama 35203
(205) 251-1000

APPENDIX

IN THE
SUPREME COURT OF THE UNITED STATES

CYNTHIA HARRIS,	)	
	)	
Appellant,	)	
	)	CASE NO. 91-692
v.	)	
	)	
THE CITY OF BIRMINGHAM	)	
et al.,	)	
	)	
Appellees.	)	
	)	

AFFIDAVIT OF MICHAEL A. BURNETT

My name is Michael A. Burnett, and I am over the age of eighteen (18) years. I have personal knowledge of the matters stated herein.

On February 13, 1992, I deposited in the United States mail the attached letter, together with its attachments, addressed as indicated, first class postage prepaid.

Also on February 13, 1992, I delivered to Federal Express for overnight delivery a second original of the attached letter, together with its attachments, addressed as follows: Assistant Attorney General, Civil Rights Division, Department of Justice, Tenth Street and Constitution Avenue, N.W., Washington, D.C. 20530.

I have read the foregoing affidavit, and it is true and correct.

/s/ Michael A. Burnett

Michael A. Burnett

STATE OF ALABAMA)
:
JEFFERSON COUNTY)

I, the undersigned authority, a Notary Public in and for said County in said State, hereby certify that Michael A. Burnett, whose name is signed to the foregoing instrument and who is known to me, acknowledged before me on this day that, being informed of the contents of such instrument, he executed the same voluntarily on the day the same bears date.

GIVEN under my hand and seal, this 13th day of February, 1992.

[NOTARIAL SEAL] /s/ Diane Burtnett Stokes
Notary Public

My Commission Expires: 10-15-92

James K. Baker
c/o Haskell Slaughter Young & Johnston
800 AmSouth-Sonat Tower
1900 Fifth Avenue North
Birmingham, Alabama 35203
(205) 251-1000 (ext. 418)

February 13, 1992

VIA FEDERAL EXPRESS and
UNITED STATES MAIL

Assistant Attorney General
Civil Rights Division
Department of Justice
Post Office Box 66428
Washington, D.C. 20035-6128

Attention: Chief, Voting Rights Section

Re: Section 5, Voting Rights Act Submission,
State of Alabama Acts 84-131 and 91-187
(codified 1975 Code of Alabama 11-65-1 et seq.)
and Setting of Referendum Thereunder

Dear Sir:

The above referenced statutes enacted into law by the legislature of the State of Alabama are enclosed and are hereby submitted for pre-clearance under Section 5 of the Voting Rights Act, 42 U.S.C. 1973c by the City of Birmingham. Also submitted for preclearance is the setting of a referendum to be held pursuant to Act No. 91-187.

The legislative enactments involved are, respectively, authorization to Class 1 cities in Alabama (Birmingham being the

only such city) to permit Horse Racing (Act 84-131) and Greyhound Racing (Act 91-187) and pari-mutuel wagering thereon. The 1991 Greyhound Racing Act was an amendment to the 1984 Horse Racing Act. As far as can be ascertained, neither the Horse Racing Act nor its Greyhound Racing amendment have been submitted for Section 5 clearance by either the State of Alabama or any affected local government or governmental entity or commission.

A relevant narrative of the provisions and the history to date of these statutes is in order:

Both the Horse Racing Act and the amendatory Greyhound Racing Act conditioned the conduct of horse and greyhound racing on the approval at a referendum election of a majority of the voters of Jefferson County (wherein the track facility and the City of Birmingham are located) voting in the election *and* a majority of the Birmingham Voters who voted in the election. At the time of the June 12, 1984 Horse Racing election, Birmingham was located entirely in Jefferson County. Horse Racing was approved at the election. Unfortunately, Horse Racing, as conducted at the Birmingham track, was a financial disaster causing the track to cease racing operations.

Greyhound racing, as had been then authorized for several years by Alabama legislative acts in the City of Mobile and in Macon and Greene Counties, enjoyed a more successful economic history. In apparent response to this fact, interested Birmingham forces joined in pursuing the enactment of a state statute authorizing Greyhound racing at the then-dormant horse racing facility in the City. Hence, the July 18, 1991 enactment of the Greyhound Racing amendment to the 1984 Act authorizing horse racing in Birmingham.

As authorized by the Greyhound Racing Act (No. 91-187), the City Council of Birmingham called a referendum election for August 27, 1991, among Jefferson County and City of Birmingham voters on the question of the conduct of Greyhound Racing at the existing Birmingham racing facility. About two weeks prior to the election date, Greene County's Racing Commission, Board of Education and the Greene County

Commission (the County's governing body) (the "Greene County Interests") filed suit in the U.S. District Court in Birmingham seeking to enjoin the holding of the Birmingham-Jefferson County referendum election on greyhound racing because the Greyhound Racing Act (Act No. 91-187) had not been submitted for pre-clearance under Section 5 of the Voting Rights Act. Though the Greene County Interests were properly found to lack standing, they have pursued the litigation through a nominal plaintiff/appellant serving as their "front."

Here it should be noted that after the referendum on horse racing, the City of Birmingham annexed a small area in adjoining Shelby County. This annexation obtained at the time of the enactment of the Greyhound Racing Act and at the time of the August 27, 1991 referendum election on greyhound racing. Under the 1991 Act, however, eligible voters were only those residents registered to vote in Jefferson County and in the City of Birmingham located in Jefferson County. (The track, as previously stated, was situated in that portion of the City located in Jefferson County.) At the time of the August 27, 1991 election, there were 83 registered voters in the Shelby County area annexed to Birmingham, of which number 82 were white and one black. Incomprehensibly, the plaintiffs-appellants in their Section 5 lawsuit raised the exclusion of these 82 white voters in Shelby County as inimical to the interests of black voters. And this, not withstanding the irrefutable conclusion that, as widely expected, the greyhound election results showed black voters favored greyhound racing and whites did not (as further discussed hereafter).

Pursuant to the Act, a 3-judge court was assembled, which court held a hearing on August 21, 1991. On August 26, 1991, the court issued its Judgment and Order denying the plaintiffs' request for an order enjoining the holding of the August 27, 1991 election. The basis of the Court's unanimous holding was the lack of any basis upon which to conclude that the Horse Racing Act presented any *potential* for discrimination. A copy of the Court's opinion is enclosed. Plaintiffs appealed the

district court's decision to the United States Supreme Court (*Harris v. City of Birmingham, et al.*, No. 91-962). The City of Birmingham has responded to Appellants' Jurisdictional Statement. At this writing, the Supreme Court has issued no order in those proceedings.

The referendum election was held on August 27, 1991, with the result that Greyhound Racing lost, 66,747 voting "yes", and 79,289 voting "no."

As is evident from the enclosed district court's opinion, no evidence, direct or inferential, suggests that these Racing Acts on their face or as implemented were racially discriminatory in intent or effect. We ask that you not be misled by a contrary conclusion as a result of the opposition we anticipate will be directed at this request for preclearance. A vigorous challenge from organizations recognized as champions of minority rights might, under many circumstances, warrant close scrutiny of legislation submitted for preclearance. However, as mentioned above, the Voting Rights challenge to the subject acts has been mounted solely by entities with a financial interest in a competing dog track. Though counsel for the Greene County Interests may be recognized names in the Voting Rights arena, the fact remains that their efforts are on behalf of clients whose interests are purely financial; the attack on the subject acts has nothing to do with concern over dilution of black voting strength.

In fact, the objectors' interests are antithetical to the proven interests of the majority of black voters. The Greene County interests oppose a Jefferson County dog track and have already misused the Voting Rights Act as a pretext by which to defeat it. Most blacks support a Jefferson County track. Indeed, a canvass of the returns of the August 27, 1991, election boxes demonstrates that in the voting boxes whereat the majority of the voters were black, the vote in each of those boxes was strongly in favor of greyhound racing. For this information and for the current voter registration numbers by race in Jefferson County and the City of Birmingham, enclosed please find a copy of the Jefferson County Chairman of the Board of

Registrars affidavit, as filed by the City of Birmingham with the United States Supreme Court as an appendix in the City's responsive motion to Appellant's pending appeal in that Court. Though the City welcomes full review of the subject acts, it also requests that the Section consider the source in weighing any objections.

We believe the District Court's judgment and order adequately disposes of the Section 5 issues here raised. However, as authorized by the Greyhound Racing Amendment, a subsequent referendum election will be called and the Greene County greyhound racing interests will undoubtedly again seek to enjoin the referendum. Consequently, the City's interest in certainty and economy of resources dictates this submission.

It also seems appropriate at this time to seek preclearance of the intended setting of the upcoming referendum. The proposed date has not yet been established by the Birmingham City Council for the referendum must be held within 90 days after the formal establishment of an election date of the date on which established for the referendum. The Mayor intends to submit to the City Council June 2, 1992, as the date for the referendum election, and anticipates that the City Council will approve that choice. A referendum on that date will coincide with the democratic and republican primary elections in the State of Alabama. With regard to the potential of that setting for a discriminatory impact, it should be noted that the current court-ordered redistricting plan creates a predominantly black congressional district that includes a substantial portion of Jefferson County and the City of Birmingham. Thus, black voter turnout can be expected to be high on that date.

The City will gladly respond to any inquiry; contact the undersigned, Richard Walston, or Jim Huckaby at (205) 251-1000 or at the address on the letterhead. You may also contact Fred D. Gray at (205) 727-4830 or at Post Office Box 239, Tuskegee, Alabama 36083. Additionally, please copy both the under-

signed and Fred Gray on all correspondence regarding this matter. Your office's prompt response would be appreciated.

Sincerely,

/s/ James K. Baker

James K. Baker
Special Counsel
The City of Birmingham
800 AmSouth-Sonat Tower
Birmingham, Alabama 35203
(205) 251-1000

JKB/RHW/dlb/56183
Enclosures